United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-7036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7036

ISAAC LORA, etc., et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

- against -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants-Appellees.

BRIEF FOR APPELLANTS ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Was the district court's denial of Appellants' motion for plaintiff class action certification on the ground that such certification was unnecessary improper?

2. Did the district court's order denying Appellants' motion for plaintiff and defendant class action certification contravene the mandate of Rule 23 (b)(2) of the Federal Rules of Civil Procedure to assure a class remedy against violations of civil rights?

3. Are the prerequisites for class action certification for the plaintiffs under Rule 23 (a), as well as 23

(b)(2), of the Federal Rules of Civil Procedure fulfilled?

4. Is this action properly maintainable as a class action on behalf of Appellee assistant high school superintendents, and public school principals in the City of New York under Rules 23 (a) and 23 (b) of the Federal Rules of Civil Procedure?

PRELIMINARY STATEMENT

Plaintiffs-Appellants ("Appellants") appeal from an order of the United States Court for the Eastern District of New York (Bruchhausen, J.), entered on January 6, 1976. The order denied Appellants motion for class action certification for both a plaintiff and defendant class.

STATEMENT OF THE CASE

A. The Complaint

This is a civil rights action authorized by 42 U.S.C. §§ 1981, 1983 and 2000 (d) instituted on June 11, 1975 by seven Black and Hispanic children assigned to public schools under the Board of Education of the City of New York which are classified as "special day schools" for the "socially maladjusted and emotionally

disturbed, "otherwise known as "SMED" or "600" schools. Appellants claim that such placement violates their rights under the Eighth, Thirteenth, and Fourteenth Amendments to the United States Constitution.

Appellants commenced this action on behalf of themselves and all other similarly situated as a class pursuant to Rule 23 of the Federal Rules of Civil Procedure. They are members of a class of persons who are Black or Hispanic and are in placement at "Special Day Schools for the Socially Maladjusted and Emotionally Disturbed."

Appellants also brought this action against individual local and State defendants, as well as against the named Appellees who, as assistant high school superintendents, Community school district superintendents or public school principals in the City of New York, are members of a class of persons pursuant to Rule 23 of the Federal Rules of Civil Procedure, who are authorized to approve the transfer of Plaintiffs and members of their class to "Special Day Schools

for the Socially Maladjusted and Emotionally Disturbed.*

Appellants first claim that their rights to due process, equal protection, equal educational opportunity and to be free from involuntary servitude are being violated because Appellees have placed them into the SMED schools with the natural and foreseeable consequence that such placement isolates them within a racially segregated school system, without providing them with adequate and appropriate education (P54, 126;A24).

There are presently seventeen SMED schools in New York City, with a total population of about 3,000 children.** The SMED schools are under the centralized authority of

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* The State defendants are Ewald Nyquist, the State Commissioner of Education and various officials of the New York State Division for Youth (DFY). Plaintiff Prince was in a DFY aftercare program at the time of his SMED School placement. Although the State defendants submitted an Answer (A105), they have not participated in the lower court motions or discovery up to date. Unless otherwise indicated, references to "Appellees" will refer to only the City defendants. Numbers preceded by "A" refer to pages of the Appendix. Numbers preceded by "P" refer to paragraphs of Complaint. Numbers preceded by "D" refer to paragraphs of the Answer of the City defendants.

** One of the SMED schools has closed since commencement of this suit.

of the Board's Bureau of Socially Maladjusted and Emotionally Disturbed Children ("SMEDC"). SMEDC is a bureau of the division of Special Education and Pupil Personnel Services (P46;A22).

The population of the special day schools is almost totally Black and Hispanic. Out of a population of about 3,000 children, 64% are Black, 28% are Hispanic and only 8% "other." The racial composition of the entire New York City public school system is 36.6% Black, 23.2% Hispanic and 40.2% "other" (P59;A26-27).

Appellants contend that only a small percentage of all children who pass through the SMED school system ever obtain a high school diploma from any school (P60;A26-27). Moreover, they state that most children who enter the "600" school system leave it years later without improvement in their reading ability (P61;A27).

Appellants assert that they have been "pushed out" of their regular schools into an isolated system because they are minority group children for whom Appellees have failed to provide with an adequate academic program and with appropriate guidance to foster normal social

adjustment (P56;A25-26). Appellants second claim states that there are educational alternatives which are less restrictive and more effective than SMED schools which can be used to serve their needs (P127;A45).

Third, Appellants allege that they have been denied due process of law because they have been assigned to special day schools without adequate notice and an opportunity to be heard at a due process evidentiary hearing to determine whether such assignment is proper and justified, and without receiving a right to periodic review of their status (P56,127;A25-26,45).

The named Appellees and the vast majority of children presently in SMED school placement were referred to SMED schools from the regular public school system under "Special Circular No. 47, 1972-1973," issued by Appellee Anker, Chancellor of Appellee Board of Education (P47-50;A23-24). On December 1, 1975, this circular was superceded by "Special Circular No. 35, 1975-1976.* Special Circular No. 47 set forth the official criteria for screening and

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* Special Circular No. 47 and the new circular, which had not yet been in effect at the time the complaint was filed, are annexed to this Brief.

referral of students to SMED schools. First, the child must have had a higher intelligence level than the maximum established for "Children with Retarded Mental Development." Second, there had to have been "[a] history of repeated disruptive and aggressive behavior, extensive in scope and serious in nature, which either endangers the safety of pupils or others, or seriously interferes with learning in the classroom." Third, the child must have had a history of truancy, and, finally, the pupil must have failed "to respond to intensive efforts by the home school to help him" (P47,A22-23).

Special Circular No. 47 required that preliminary screening be performed by the referring guidance counselor, "or by other appropriately trained professional persons designated by the [community or supervising assistant] superintendents. The community school superintendent, or supervising assistant superintendent if a high school student is involved, approved the counselor's recommendation (P48,A23).

Following the preliminary screening, Special Circular No. 47 required that the principal and guidance counselor

of the SMED school to which a child has been referred, interview the child. When a referral did not seem appropriate, the Circular mandated that the superintendent in charge of the SMED schools evaluate all the available data and "work out appropriate steps to be taken (P49; A23).

Although Special Circular No. 47 stated that "[a] letter of parental consent should accompany the referral," Appellants claim that such consent was most often given as a result of misinformation and coercion (P55,70,82,89, 105; A25,30,33,35,39).

The criteria for SMED school referral under the new circular are like those of the superceded circular, except that truancy is no longer an enumerated consideration. The new special circular, like the one superceded, contains no mandate that the child's consent be obtained. It also contains no provisions to assure that parental consent is given voluntarily and informedly, with other alternatives and the child's rights discussed.

Although the new circular now requires Bureau of Child Guidance clinical evaluations before referral to

SMED schools, and post-placement reevaluations, Appellants contend that the vast majority of children presently in SMED schools have not received BCG clinical evaluations before or after referral, nor are they receiving therapy for their alleged "emotional disturbance" while in SMED placement (P75,82,91,106,121;A31,33,36,39,43).

Fourth, Appellants claim that Appellees' act of subjecting plaintiffs to the special day schools because they are, supposedly, children with emotional problems who require special education, while at the same time, other children similarly labeled are assigned to "classes for the emotionally handicapped," special education classes held within regular public schools with fewer students and more staff resources, violates their right to equal protection under the law (P66-67,127;A28-29,45).

Fifth, Appellants contend that, although the regular school system is sexually integrated, the SMED schools are sexually segregated in violation of their rights to due process of law and equal protection under the law (P63, 130;A27,46).

Sixth, Appellants allege that Appellees' have per-

petuated a policy of indiscriminately searching the persons of children as they enter various SMED schools, in violation of their rights to be free from unreasonable search and seizure and to privacy (P64,131;A28,46).

Seventh, Appellants assert that Appellees corporal punishment or, in the alternative, use of excessive and unnecessary corporal punishment upon special day school students is cruel and unusual and violates their right to due process of law (P65,132;A28,46-47).

Appellants seek a declaratory judgment that Appellees have violated the constitutional rights of the named plaintiff and members of their purported class. They further seek an order enjoining Appellees from continuing the placement of the named plaintiffs and members of their class in SMED schools unless these unconstitutional acts and omissions are rectified (A47-50).

B. The City's Answer

On October 6, 1975, Appellees filed an Answer in which they deny violating the constitutional rights of Appellants or members of their class. Appellees assert that each student has constant and intensive interaction with teachers

laced with regular BCG involvement (D46;A66). However, they admit that for the 1974-1975 school year only one-third of SMED school children raised their reading level one-half year or more (D40;A64).

Appellees contend that the SMED school provides a total therapeutic environment (D46;A66). They affirmatively allege, inter alia, that the SMED school program provides the educational and clinical services required by law to meet the individual needs of the referred students (D100;A94) and that at all times and in all respects they have acted in good faith pursuant to statutory authority and the By-Laws of the Board of Education (D99;A94).

Appellees admit that "the ethnic breakdown of the approximate 2950 students in SMED schools as of May 31, 1975, is 64% Black, 28% Puerto Rican and 8% other Spanish surnamed American and 'others' while the city wide ethnic breakdown contains over 40% non-Black and non-Puerto Rican students (D38;A62-63).

Appellees further admit that a due process evidentiary hearing is not a mandated part of the SMED school placement process (D50,58,64,74,81;A68,73-74,77,82,85-86)

but deny constitutional deprivation as a result.

C. The Proceedings Below

After the Answers to the Complaint were filed, Appellants moved for an order certifying the proceeding as a class action on behalf of the plaintiffs and the defendant school superintendents and principals. In his memorandum and order, dated January 6, 1976, Judge Bruchhausen denied the motion. Relying upon Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1974) cert. denied 417 U.S. 936 and Thomas v. Weinberger, 384 F. Supp. 540 (S.D.N.Y. 1974), and paraphrasing the Corporation Counsel's statement that defendants will halt any actions as to all SMED students determined to be unconstitutional (See Affidavit of Joseph F. Bruno in opposition to class action certification, ¶6;A116; Defendants Memorandum of Law in Opposition to Class Action Certification, P. 17), Judge Bruchhausen held, on page 7 of the order, that:

> "It is unnecessary to consider whether the requirements of Rule 23 have been satisfied, because the court. . . concludes that a class action status is unnecessary." (A125).

On January 22, 1976, Appellants filed a notice of

motion for a preliminary injunction. The motion, made returnable for February 9, 1976 has been adjourned at Appellees' request to March 3, 1976. Appellants seek an order preliminarily enjoining Appellees from continuing their placement in SMED schools unless within 10 days from the date of said order they are given notice of the reasons for such placement and a due process evidentiary hearing.

Appellants further seek a preliminary injunction against the searching of their persons without probable cause and against requiring them to remove all belongings and to place them with school officials each morning as a precondition to attending classes. However, as a result of Judge Bruchhausen's order denying class action certification, Appellants are precluded from seeking an order protecting the other children who comprise their purported class.

POINT I

THE DISTRICT COURT IMPROPERLY DENIED APPELLANTS' MOTION FOR CLASS ACTION CERTIFICATION SINCE CLASS ACTION CERTIFICATION IS NECESSARY TO PRESERVE THE FORUM IN WHICH MEMBERS OF THE PURPORTED CLASS MAY LITIGATE THEIR LEGAL CLAIMS.

The lower court erroneously held that because declaratory and injunctive relief is sought, class certification is unnecessary. In so deciding, the court ignored one of the basic purposes of the class action, which is to preserve a cause of action for a group of individuals, even though the passage of time may deprive any single individual of the standing necessary to assert that cause of action.

Board of School Commissioners v. Jacobs, 95 S.Ct. 848 (1975) is illustrative of this point. In that case, the Supreme Court held an action on behalf of a group of high school students to be moot because by the time the case reached the Supreme Court, plaintiffs had graduated. It was specifically noted by the Court that it was the absence of a proper class determination by the District Court that had rendered the action moot.

> The only formal entry made by District Court below purporting to certify this case a class action is contained in that court's 'Entry on Motion for Permanent Injunction,' wherein the court 'conclude[d] and ordered' that 'the remaining named plaintiffs are qualified as proper representatives of the class whose interest they seek to protect.'

> 349 F. Supp., at 611. No other effort was made to identify the class or to certify the class action as contemplated by Rule 23 (c)(3) that' [the] judgment in a action maintained as a class action under the subdivision...(b)(2)... shall include and describe those whom the court finds to be members of the class.' The need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as to the initial named plaintiffs prior to the exhaustion of appellate review.
> 95 S. Ct. at 850. [Emphasis added.]

Certification of the class in the instant case is equally important. Appellants are all junior high school or high school students in SMED schools. It is most probable, that none of them will remain in SMED school placement until the litigation has ended. Of course, they will all age with the passage of time, and ultimately will leave school altogether. Thus, Appellants face the real danger of losing their standing to assert the claims raised by this suit before having had an opportunity to complete the course of litigation. However, the issues raised by the complaint will persist, and the practices and procedures complained of will continue to affect other children

who are similarly situated. Only through class designation can the standing of plaintiffs be preserved, technical mootness of the suit be avoided, and the issues raised herein ever be resolved. See also concurring opinion of Justice Marshall in Preiser v. Newkirk, 95 S.Ct. 2330 (1975); and Jimenez v. Weinberger, 523 F. 2d 689, 700 (7th Cir. 1975) where Mr. Justice Stevens, citing Jacobs just before his Supreme Court appointment, emphasized the necessity of an early court decision on whether a case is to proceed as a class action because of several reasons, including the "risk that the failure to certify may result in a dismissal of an entire case if the claim of the named plaintiff should become moot."

The necessity for class action certification in this case is further demonstrated by the Supreme Court's ruling in Sosna v. Iowa, 95 S.Ct. 553 (1975). In Sosna, the plaintiff challenged the Iowa divorce statute's one year residency requirement. The District Court certified the class prior to reaching a decision on the merits of the case. During the pendency of the litigation, however, plaintiff had complied with the residency requirement and had also

obtained her divorce elsewhere. Nonetheless, the Supreme Court found that because there had been a class determination, plaintiff continued to be an adequate representative of the class. Justice Rehnquist stated:

> But even though respondents in the proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it against those persons in the class appellant sought to represent and which the District Court certified. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conslusion. 95 S.Ct. at 557-8.

See also Allen v. Liking, 517 F. 2d 532 (8th Cir. 1975).

Seemingly ignoring the teachings of the above cases, the district court mistakenly relied upon Galvan v. Levine, 490 F. 2d 1255 (2d Cir. 1973), cert. den. 417 U.S. 936 (1974) and Thomas v. Weinberger, 384 F. Supp. 540 (S.D.N.Y. 1974).

In Galvan, the Second Circuit held that denial of class action designation would not "ring a death knell on the

prosecution of the action" since a final decision had already been made in favor of the named plaintiffs, ordering the State to terminate a policy concerning unemployment compensation that discriminated against Puerto Ricans. Moreover, the State had submitted an affidavit stating that it understood the entered judgment to bind it to all claimants, and, in fact, the State had withdrawn the challenged policy even more fully than the court ultimately directed, supra. at 1260-1261. Similarly, in Thomas no conceivable mootness question existed nor did denial of class action status create possible prejudice to full litigation of the issues raised.

Contrary to Galvan, Thomas and the other cases used by defendants to support their frivolous argument in the lower court* this case presents circumstances where denial of

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* See Vulcan Society v. Civil Service Comm., 490 F. 21 387 (2d Cir. 1973); U.S. v. Hall, 472 F. 2d 261 (5th Cir. 1972); Bailey v. Patterson, 323 F. 2d 201 (5th Cir. 1963), cert. den. 376 U.S. 910 (1964).

plaintiffs' motion for class action certification would undoubtedly "ring a death knell on the prosecution of the action." 490 F. 2d at 1260. There is a danger that before all the issues in this case are resolved the named Appellants will no longer be affected by Appellees' actions and a justiciable controversy will no longer exist. However, other children will continue to suffer from the alleged deprivation of constitutional rights.

POINT II

THE LOWER COURT ORDER HAS DENIED APPELLANTS THEIR RIGHT TO ASSURE A CLASS REMEDY UNDER RULE 23 (b)(2) OF THE FEDERAL RULES CIVIL PROCEDURE AGAINST VIOLATIONS OF CIVIL RIGHTS AND, HENCE, SHOULD BE REVERSED.

The lower court held, in effect, that because Appellants' claims concern actions by Appellees which are generally applicable to the purported class, any relief would inure to the benefit of the class without designation of the suit as a class action on behalf of the plaintiffs or the defendants. Undoubtedly, such faulty reasoning frustrates the purpose of Rule 23 of the Federal Rules of Civil Procedure to assure a clear remedy for an entire class of individuals whose federal rights are being violated on grounds generally

applicable to them.*

In Rodriguez v. Percell, 391 F. Supp. 38 (S.D.N.Y. 1975), the court rejected the New York City Board of Education's argument that because the named plaintiffs were suing on grounds generally applicable to the purported class, class action designation was unnecessary. Judge Frankel said, at 41 n.2, in the action brought by Hispanic students concerning bilingual education:

> "Defendants point out that the City may be relied upon to obey any final decree in this case, suggesting that it is therefore unnecessary to hold the action to be on behalf of a class. The same may be said, however, in the great bulk of cases for which subdivision (b)(2) or Rule 23 was written. The least that can be said on the other side is that the rule plainly applies, that there is no discernible prejudice to defendants in applying it, and that plaintiffs are entitled to have the full scope of their

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* With other prerequisites fulfilled under 23 (a), see pp. 26-30, infra., Rule 23 (b)(2) allows a class action when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . ." Appellants also claimed in the lower court, that class action certification would be appropriate under Federal Rules Civil Procedure Rule 23 (b)(1)(A) or 23 (b)(3).

decree made explicit and unmistakable."*

Even prior to the enactment of subsection (b)(2) of Rule 23 in 1966, class actions were an appropriate means to vindicate alleged denials of civil rights. However, 23 (b)(2) now makes it clear that civil rights suits for injunctive and declaratory relief are most appropriately deemed class actions. See Wright and Miller, Federal Practice and Procedure: Civil, §1776; Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187, 1191 (D.Md. 1973), modified on other grounds, 486 F. 2d 1134. By depriving Appellants of their right to represent a class the lower court failed to recognize that the alleged violations of civil rights here present the paradigm circumstances for implementation of the mandate of Rule 23 (b)(2).

First, suits involving allegations of racial discrimination under the Civil Rights Acts, 42 U.S.C. § 1981 et seq. and 42 U.S.C. §2000 et. seq. are "inherently class suits"

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* Rodriquez merely reaffirmed the teaching of the Supreme Court in United States v. Oregon State Medical Society, 343 U.S. 321, 333 (1952). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform....

since "[b]y definition, discrimination on the basis of race .. is a class wrong." Rodriguez v. East Texas Motor Freight, 505 F. 2d 40, 50, (5th Cir. 1974). Hence, class action status has traditionally been granted to plaintiffs challenging school segregation based on race, e.g., Brown v. Board of Education, 347 U.S. 483 (1954); Hart v. Community School Board of Education, N.Y. School Dist #21, 512 F. 2d 37 (2d Cir. 1975); Ross v. Dyer, 312 F. 2d 191 (5th Cir. 1963); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967).

In Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963), the Court discusses the type of systemic attack in which class action status is appropriate.

> Properly construed, the purpose of the suit was not to achieve specific assignment of specific children to any specific grade or school... It was directed at the system-wide policy of racial dis-discrimination. It sought obliteration of that policy of system-wide racial discrimination.
> Id. at 288.

Likewise, the instant plaintiffs challenge a system-wide policy of placing minority group children into SMED schools.

Second, class action status has been repeatedly granted

to plaintiffs asserting rights to due process hearings, e g., Goss v. Lopez, 95 S.Ct. 729 (1975) [before high school suspension]; Clayton v. Jones, 463 F. 2d 1182 (6th Cir. 1972) [before transfer of prisoner to solitary confinement]; Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974) [before transfer of prisoners to more secure penal institutions]; Frost v. Weinberger, 375 F. Supp. 1312 (E.D.N.Y. 1974) [before downward adjustment of social security survivors' benefits]; Torres v. New York State Dept. of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970) [prior to cut-off of unemployment benefits]; Elliot v. Weinberger, 371 F. Supp. 960 (D. Hawaii 1974) [before adverse administrative agency action].

Most importantly, Rule 23 (b) has been appropriately used in cases where "exceptional" children, such as the mentally retarded, physically handicapped and emotionally disturbed, sought adequate public school education. E.g., Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 297 (E.D. Pa. 1972); Panitch v. State of Wisconsin,

371 F. Supp. 955 (E.D. Wisc. 1974); Lebanks v. Spears, 60 F.R.D. 135 (D. Pa. 1973)*

Moreover, class actions have been used to challenge the search practices of public officials, Lankford v. Gelston 364 F. 2d 197 (4th Cir. 1966); and the use of corporal punishment in schools, Ware v. Estes, 328 F. Supp. 657, aff'd 458 F. 2d 1360**.

By denying Appellants' class action motion, the court below rejected the above cited holdings and abrogated the unequivocable policy of Rule 23 to assure a complete remedy

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* Class action status has also been consistently granted to plaintiffs who have challenged conditions in mental facilities, e.g., Wyatt v. Aderholdt, 508 F. 2d 1305 (5th Cir. 1974); New York State Ass'n. for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); as well as conditions in prisons, e.g., Rhem v. Malcolm, 371 F. Supp. 594, 597 (S.D.N.Y. 1974), aff'd as to conclusions of fact and law, 507 F. 2d 333. United States ex rel. Walker v. Mancusi, 358 F. Supp. 311 (W.D.N.Y. 1971), aff'd 467 F. 2d 51 (2d Cir. 1972); Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971); Inmates of Attica Correctional Facility v. Rockefeller, 453 F. 2d 12 (2d Cir. 1971).

** Other cases in which class actions have been held appropriate to challenge actions of school administrators include, e.g. Fujishima v. Board of Education, 460 F. 2d 1355 (7th Cir. 1972). [constitutionality of board rule prohibiting distribution of material on premises without prior review] and Minarcini v. Strongsville City School Dist., 384 F. Supp. 698 (N.D. Ohio, 1974).

for a class of persons faced with circumstances such as thos alleged herein.

Appellants contend that the placement of minority group children into speial schools for "emotionally handicapped," is racially discriminatory, fails to provide them with adequate education and violates the children's due process rights. Certainly these are optimal claims for designation of a class under Rule 23 (b)(2). Conjecture by the lower court that relief only for the named plaintiffs may inure to the benefit of the class is not sufficient reason to prevent Appellants from receiving the class protection of Rule 23. Rodriguez v. Peicell, supra. Appellants are entitled to declaratory and injunctive relief for the class should their claims be proven. See Workman v. Mitchell, 502 F. 2d 1201, 1207-08 (9th Cir. 1974).

Appellants are not merely alleging that they alone are being deprived of adequate education and procedural due process, and are being racially discriminated against and subject to unconstitutional practices. Rather, they contend that such deprivations are common to a large class of minority children. Full litigation of the factual issues

raised in the complaint necessitates class designation. Potts v. Flax, supra.

Actually, the district court's denial of class certification has already restricted the scope of equitable relief available to Appellants. They have made a motion for a preliminary injunction against their continued placement in SMED schools without due process and their continued subjection to school searches. Unfortunately, as a result of the lower court's order, they are prevented from seeking the explicit preliminary relief necessary to assure that even if they are protected, Appellees will not continue to violate the rights of the thousands of other children in their purported class.*

The prerequisites of Rule 23 (a) for class certification are fulfilled.

Of course, Rule 23 requires that the conditions for class action enumerated in 23 (a) be fulfilled in addition to the requirement of 23 (b)(2). In the instant

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* Appellants motion for the preliminary injunction was made returnable on February 9, 1976.

case Rule 23 (a) is clearly satisfied.*

First, the class is so numerous that joinder of all members is impracticable. Appellants seek to represent all children who are Black or Hispanic and are in placement in SMED schools. There are approximately 2,650 Black or Hispanic persons so placed presently (D38;A62-63).

Second, there are common questions of law and fact namely whether Appellees' actions of placing minority students into the racially and sexually segregated special day schools violates the rights of Appellants and their class under the Constitution of the United States and the Civil Rights Acts of 1870, 1871 and 1964, and whether the complained of search and seizures and corporal punishment violate Appellants constitutional rights.

The claims of the representative plaintiffs are typical of the claims of the members of the class, and the defendants have in fact, interposed identical defenses to such claims.

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* The district court held that "[i]t is unnecessary to consider whether the requirements of Rule 23 have been satisfied" on the basis of its conclusion that class certification was unnecessary (A 125).

Finally, the representative plaintiffs and their attorneys, The Legal Aid Society of the City of New York, Juvenile Rights Division, will fairly and adequately protect the interests of the class.

In the lower court, Appellees made a bald and immaterial assertion that many class members will take antagonistic positions to Appellants. The Second Circuit, in Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 923, 927 (2d Cir. 1968), stated:

> The fact that some members of the class were personally satisfied with the defendants' relocation efforts is irrelevant.

See Inmates of Attica Correctional Facility v. Rockefeller, supra at 24-24 (2d Cir. 1971). See also Moss v. Lane Company, 50 FRD 122 (W.D. Va. 1970).

Similarly, in Lynch v. Baxley, 386 F. Supp. 378 386 (M.D. Ala. 1974), a suit challenging involuntary commitment statutes, the court remarked:

> As a practical matter, it is immaterial that certain potential class members may be satisfied with their present status and indifferent as to the constitutionality of the statutes herein attacked... The fact that each member of the class is subject to the same deprivation of consti-

> tutional rights as the representative parties is sufficient to fulfill the representation requirements of Rule 23 (a)(3) and (4).

See also Minarcini v. Strongsville City School District supra. at 707-8 (N.D. Ohio 1974).

Nor do the different circumstances surrounding each child's placement in SMED school affect the propriety of class determination. As noted by the district court in Bennett v. Gravelle, 323 F. Supp. 203, 218 (D. Md. 1971), aff'd 451 F. 2d 1011 (4th Cir. 1971), cert. den. 407 U.S. 917 (1972);

> Class actions have lone been used successfully against segregation. E.g., Brown v. Bd. of Ed., 347 U.S. 483 (1954). The use of class actions is particularly appropriate inasmuch as racial discrimination is by definition a class discrimination, even though individual rights are involved. E.g., Lance v. Plummer, 353 F. 2d 585 (5th Cir. 1965), cert. den. 384 U.S. 929 (1966); Potts v. Flax, 313 F. 2d 284 (5th Cir. 1963); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. (1966).

In sum, even if there are parents and children who received adequate information and were presented with feasible alternatives prior to placement in a SMED school which is

now completely satisfying to them,which Appellants submit is certainly not the norm, class certification is appropriate.

With the prerequisites of Rule 23 (a) fulfilled, Appellants may be certified as representative of the purported class pursuant to 23 (b)(2).

POINT III

THIS ACTION IS PROPERLY MAINTAINABLE AS A CLASS ACTION ON BEHALF OF APPELLEE ASSISTANT HIGH SCHOOL DISTRICT SUPERINTENDENTS AND PUBLIC SCHOOL PRINCIPALS IN THE CITY OF NEW YORK UNDER RULES 23 (a) AND 23 (b)(2).

The test for certification of a defendant class under Rule 23 is the same as that employed to determine whether plaintiffs should be granted class status. See Wright and Miller, supra, § 1770. In the instant case, class action status on behalf of Appellees assistant high school superintendents, community school district superintendents and public school principals in the City of New York is proper since such class satisfies Rule 23 (a) of the Federal Rules of Civil Procedure and in addition fulfills the mandates of Rules 23 (b)(1)(A), 23 (b)(2) or 23 (b)(3).

Rule 23 (a) is satisfied. The class is so numerous that joinder of all members is impracticable. There are approximately nine hundred sixty (960) assistant high school superintendents, community school district superintendents and public school principals in the City of New York authorized to place Appellants and members of their class in special day schools.

Moreover, there are common questions of law and fact, namely whether Appellee class' action approving the placement of Appellants' class in special day schools violates Appellants' rights under the Constitution of the United States.

Furthermore, the defenses of the representative Appellees will by typical of the defenses of the members of the class. Finally, the Corporation Counsel of the City of New York, attorneys for the Appellee class, will fairly and adequately protect the interest of the Defendant class.

Similar to Appellants' class, Appellees class certification is most appropriately maintainable under Rule 23 (b)(2).

Appellants have acted or refused to act on grounds generally applicable to their class which induced defendants to place them in special day schools. For example, all SMED placements have ostensibly fulfilled the official criteria for screening and referral to SMED schools. These procedures involve SMED placement referrals and approvals by members of the defendant class. See pp. 7 to 9, ante. Declaratory and injunctive relief is appropriate with respect to the class as whole, who have all acted under color of state law. Moreover, this class is easily manageable.

CONCLUSION

THE ORDER OF THE LOWER COURT DENYING CLASS ACTION CERTIFICATION FOR PLAINTIFF CLASS AND DEFENDANT CLASS SHOULD BE REVERSED.

Dated: Brooklyn, New York
March 5th, 1976

Respectfully submitted,

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Special Circular No. 47, 1972-1973

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE DEPUTY CHANCELLOR

MICHAEL B. ROSEN
COUNSEL TO THE CHANCELLOR

November 22, 1972

TO: ALL COMMUNITY SCHOOL BOARD CHAIRMEN, ALL SUPERINTENDENTS, EXECUTIVE DIRECTORS, DIRECTORS, HEADS OF BUREAUS AND PRINCIPALS OF ALL DAY SCHOOLS

Ladies and Gentlemen:

SCREENING PROCEDURE FOR SPECIAL DAY SCHOOLS FOR SOCIALLY MALADJUSTED AND EMOTIONALLY DISTURBED CHILDREN

(This Circular Supersedes Special Circular No. 8, 1961-1962 on Screening Procedures)

The Special Day Schools for Socially Maladjusted and Emotionally Disturbed Children are an integral part of the New York City School System. Their major purpose involves the social, emotional and educational rehabilitation of children whose needs are such that they cannot be met in the normal setting of a large school, who have demonstrated over a period of time a lack of reasonable self-control, and whose behavior is seriously disrupting the education of large numbers of children in the regular school. In some instances, there will be children who should not be in attendance even in a Special Day School, but should be cared for in facilities for very disturbed children.

In order to serve the best interests of children for whom the Special Day Schools are organized, it is necessary to establish clear procedures for the placement of children in these schools.

1. Criteria for Screening and Referral

   1. An intelligence level determined by a psychologist which is above that provided for by the program for Children with Retarded Mental Development.

   2. A history of repeated disruptive and aggressive behavior, extensive in scope and serious in nature, which either endangers the safety of pupils or others, or seriously interferes with learning in the classroom.

   3. A history of truancy, if coupled with aggressive and disruptive behavior.

   4. The failure of the pupil to respond to intensive efforts by the home school to help him.

2. Role of the Guidance Coordinator in the Superintendent's Office and the Guidance Counselor in the Referring Day School

   1. The district guidance coordinator and the referring guidance counselor should assist the Bureau of Child Guidance team by assembling all data pertinent to the referral.

   2. The district guidance coordinator and the referring guidance counselor should make as many of the contacts as possible with courts, clinics, hospitals and social agencies, etc., so that privileged and confidential reports and other pertinent data may be made available to the clinical team.

(Continued on Reverse Side)

3. Steps in Referral

1. The referral to the Special Day School will be initiated by the community superintendent, or the supervising assistant superintendent in the High School office.

2. Preliminary screening will be performed by the referring district guidance coordinator or by other appropriately trained professional persons designated by the superintendent.

3. All referrals must be approved by the community superintendent, or the appropriate supervising assistant superintendent and sent to the Special Day School principals.

4. A complete and up-to-date anecdotal record and all other pertinent data, i.e., copy of cumulative record cards, testing card, health record, and copy of recommendations of the referral agency must accompany the referral to the Special Day School. At the time of the referral, permanent cumulative records should not be included.

5. A letter of parental consent should accompany the referral.

6. Copies of Bureau of Child Guidance reports for those children tested by the bureau during the previous 3-5 year period should be included.

7. Record of court involvement because of overt behavior in or out of school, child neglect or abuse and any drug problem in the home should accompany the referral.

8. Before admission to the Special Day School, the principal and guidance counselor of that school must interview the applicant with parent or guardian.

9. If there is any doubt concerning the suitability of the referral, the Bureau of Child Guidance team at the Special School should be requested to help the principal resolve the problem.

10. Review of Referrals:

When a referral does not seem appropriate, the referral, together with a covering letter stating specifically the reasons for doubt, is to be sent by the Special Day School principal to the superintendent in charge of the Special Day Schools. The superintendent will evaluate the available data with the community superintendent or supervising assistant superintendent and jointly work out appropriate steps to be taken.

4. Acceptance of Referred Applicant

The Special Day School principal will notify the principal of the sending school and the superintendent upon the admission of the referred student. All records, not previously forwarded, will then be sent on to the Special Day School.

Very truly yours,

IRVING ANKER
Deputy Chancellor

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE CHANCELLOR

Special Circular No. 35, 1975-1976 December 1, 1975

TO COMMUNITY SCHOOL BOARD CHAIRMEN, ALL SUPERINTENDENTS, EXECUTIVE DIRECTORS, DIRECTORS, HEADS OF BUREAUS AND PRINCIPALS OF ALL DAY SCHOOLS

Ladies and Gentlemen:

SCREENING PROCEDURES FOR CHILDREN WHO ARE EMOTIONALLY HANDICAPPED

(This Circular Supersedes Special Circular No. 47, 1972-1973 on Screening Procedures)

The Division of Special Education and Pupil Personnel Services has established in all school districts, programs for the emotionally handicapped.

These programs include resource rooms for the emotionally handicapped, classes for the emotionally handicapped, schools for the socially maladjusted and emotionally disturbed, and Alternative Programs.

These special programs provide social and emotional treatment and special education specific to the needs of the students who have manifested serious emotional problems of psycho-social origin or because of social reaction, and despite all reasonable efforts to accommodate the regular school program to their needs, are seriously handicapped by their chronic inability to cope within a normal school setting.

These new procedures comply with Section 200.2 of the Regulations of the Commissioner of Education pertaining to the identification of and provision for students with special handicapping conditions.

In order to assure the effectiveness of the program, the following procedural guidelines are presented:

1. PROCEDURES FOR SCREENING AND REFERRAL

1.1 Students who manifest serious emotional difficulties are to be referred for clinical assessment to the Bureau of Child Guidance worker on the basis of their troubled or troubling behavior.

1.2 The following are among the criteria to be considered for clinical determination of eligibility in special programs for the emotionally handicapped:

1.2.1 Intelligence level which is above that provided for by the Bureau for Children with Retarded Mental Development.

1.2.2 History of repeated maladaptive, disruptive and/or aggressive behavior, extensive in scope and serious in nature.

1.2.3 The chronic inability of the student to respond positively to intensive efforts by the school to help him cope within the normal school setting.

1.3 Following consultation with the parent, the school guidance counselor or other designated school person shall make the BCG referral and obtain the principal's signature.

1.4 Parental consent must be obtained prior to commencing with the diagnostic work-up.

1.5 The school guidance counselor or other designated school person shall assemble all data pertinent to the referral. This may include contacts with courts, clinics, hospitals, and social agencies, etc., so that all available pertinent data may be made available to the BCG worker. The school shall provide an educational profile which will include the student's academic strengths and weaknesses.

1.6 Referrals will be screened by the Bureau of Child Guidance worker on the basis of the student's history in the school, teacher observations, clinical findings available concerning the student, and other such information.

1.7 Clinical assessment of the student will be performed by the Bureau of Child Guidance worker, with the written permission of the parent. If the student is determined eligible for the special class or special day school program for the emotionally handicapped, the Bureau of Child Guidance worker will see to the confirmation of this finding by a psychological examination, a casework study of the family by a social worker, and a psychiatric consultation or examination. These evaluation components to determine clinical eligibility are mandated by the New York State Department of Education.

1.8 Parental consent and cooperation for placement in either classes or schools for the emotionally handicapped will be enlisted by BCG in collaboration with the school guidance counselor or other designated school person.

1.9 The school and/or Community School District or High School office will be advised of the student's eligibility for a special class or school for the emotionally handicapped.

1.10 Students awaiting placement shall remain in their regular schools.

1.11 When, after clinical study, the student is found not to be eligible for special class or school placement, the BCG worker will work with the school and student to provide appropriate help within the regular school program or in other programs.

(Over)

2. GUIDELINES FOR STUDENTS FOUND TO REQUIRE PLACEMENT IN CLASSES FOR THE EMOTIONALLY HANDICAPPED

2.1 A student eligible for placement in a CEH class shall have his application form approved in writing by the appropriate Community Superintendent in whose district the eligible student is currently enrolled or by the appropriate High School Superintendent.

2.2 Bureau of Child Guidance personnel and Supervisors of Classes for the Emotionally Handicapped will hold regular placement meetings where all clinically eligible referrals, in accordance with the procedures described in Section 1 above, will be discussed with a view towards determining the most appropriate CEH assignment.

2.3 The CEH Supervisor assigned to the district shall be responsible for the placement of the student in a class as soon as possible.

2.4 Students referred for CEH programs will be assigned to an appropriate class according to the school and district which the student attends, insofar as possible. When necessary, however, out of district placements are to be effected, since the CEH Program is a centralized service. No eligible student is to be deprived of placement insofar as seat spaces are available.

2.5 Prior to admission to the appropriate special class, the CEH Guidance Counselor shall meet with the student and parent or guardian in order to provide orientation. The CEH Guidance Counselor shall obtain the written permission of the parent or guardian for the transfer of the student to the CEH class.

2.6 Where necessary, bus transportation shall be arranged by the CEH Area Supervisor.

2.7 All students are to be re-evaluated semi-annually and re-examined at least every three years, if they remain in the program for that length of time.

3. GUIDELINES FOR STUDENTS FOUND TO REQUIRE PLACEMENT IN SPECIAL DAY SCHOOLS FOR SOCIALLY MALAJUSTED AND EMOTIONALLY DISTURBED CHILDREN

3.1 When a school and/or Community School District or High School office as advised of the student's eligibility for the SMED Day Schools, as described in Section 1 above, they will then prepare the application form for Special Day Schools. The Special Day School application form must be approved in writing by the appropriate Community or High School Superintendent.

3.2 This form is to be given to the Bureau of Child Guidance worker, who will forward the form, the clinical findings and copies of all pertinent records to an Assignment Committee, which consists of a Borough Representative of the Bureau for Socially Maladjusted and Emotionally Disturbed Children and a Bureau of Child Guidance representative of the Bureau of Child Guidance.

3.3 The Assignment Committee will assign the student to an appropriate Socially Maladjusted and Emotionally Disturbed Children Day School.

3.4 The Assignment Committee will notify the Principal of the sending school and the appropriate Community or High School Superintendent of the school to which the student was assigned.

3.5 The sending school shall obtain the written permission of the parent for the transfer of the student to the Special Socially Maladjusted and Emotionally Disturbed Children Day School.

3.6 On the day scheduled for admission, the Principal and Guidance Counselor of that Special School shall interview and provide appropriate orientation for the referred student and parent or guardian.

3.7 The SMED Day School Principal shall notify the Principal of the sending school or the Community or High School Superintendent of admission of the referred student. All permanent records will then be sent to the Special Day School, including the parent's written consent.

3.8 Upon admission to the Special SMED Day School the BCG team and the Day School Principal will be responsible for the semi-annual evaluation of the student. All students are to be formally re-examined at least every three years if they remain in the program for that length of time.

3.9 In the event that a student's placement appears to be inappropriate after a reasonable period of time, it will be the responsibility of the BCG team assigned to the SMED Day School and the SMED Day School Principal to determine a more appropriate school program.

4. DISCHARGE FROM SPECIAL CLASSES OR SPECIAL DAY SCHOOLS FOR EMOTIONALLY HANDICAPPED CHILDREN

4.1 The classes for the Emotionally Handicapped and Socially Maladjusted and Emotionally Disturbed Children Day School Programs are planned to enable students to return to the regular school program after a reasonable amount of educational-therapeutic experience within the special programs. Follow-up services will be offered to assist the student's transition to the regular school program.

4.2 The CEH Supervisor and/or SMED Day School Principal shall take appropriate steps to return those students to regular classes or schools who have been recommended for such return by the special CEH or SMED School clinical team after consultation with the student's special program teachers and guidance counselor.

5. COORDINATION OF REFERRAL AND PLACEMENT

Responsibility for routing and expediting of the referral, from the time it was initiated to the time the student is admitted to the Special Class or Day School, shall be the responsibility of the Bureau of Child Guidance worker assigned to the school of origin. In cases where the referral originated in the Superintendent's office, it shall be the responsibility of the Bureau of Child Guidance Program Supervisor to follow through until placement occurs.

6. COORDINATION WITH THE COMMITTEES ON THE HANDICAPPED

The appropriate Committee on the Handicapped will be informed by the Bureau of Child Guidance when a student is determined to be eligible for a CEH class or a SMED Day School program. The Committee on the Handicapped will also be kept informed of the date of the student's placement in an appropriate program.

Very truly yours.

IRVING ANKER
Chancellor